Institutional Liability for Rape on College Campuses: Reviewing the Options

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I. INTRODUCTION

Universities have long been touted as safe havens for learning.[1] Institutions typically assure students of safety through admissions materials that emphasize a high priority on keeping campuses safe.[2] Yet this serene picture is both misleading and inaccurate, and students may be unaware of the dangers present on campus.[3] Despite robust assurances of safety, college campuses foster the type of environment in which criminal activity thrives.[4]

Assailants victimize students on campus now at an alarming rate, with a particular trend towards violent crimes such as rape.[5] One in five women has been sexually assaulted while in college.[6] In fact, a woman is more likely to be

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[1] Amanda Farahany, *Crime on College Campuses*, TRIAL, Dec. 2004, at 20, 20.

[2] *Id.*

[3] JOHN J. SLOAN III & BONNIE S. FISHER, THE DARK SIDE OF THE IVORY TOWER 29 (2011) (discussing "the medieval myth that college campuses that look safe are safe and the policy of a lot of college campuses, if it's negative to their image, what you don't know can't hurt you" (quoting *The Crime Awareness and Campus Security Act of 1989*: *Hearing on H.R. 3344 Before the Subcomm. on Postsecondary Educ. of the Comm. on Educ. and Labor*, 101st Cong. 60 (1990) (statement of Howard Clery))); *see also* Todd S. Purdum, *The Reality of Crime on Campus*, N.Y. TIMES (Apr. 10, 1988), http://www.nytimes.com/1988/04/10/education/the-reality-of-crime-on-campus.html [https://perma.cc/232E-2J5S] (arguing that college campuses are no longer the "safe, bucolic havens, academic groves where the pursuit of knowledge and the cultivation of fellowship shut out many of the threats and fears of everyday life").

[4] BONNIE S. FISHER ET AL., U.S. DEP'T OF JUSTICE, NCJ 182369, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 1 (Dec. 2000), https://www.ncjrs.gov/pdffiles1/nij/182369.pdf [https://perma.cc/5WAV-9A7T] ("[C]ollege campuses are not ivory towers but, instead, have become hot spots for criminal activity.").

[5] *See* WHITE HOUSE COUNCIL ON WOMEN & GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 14 (Jan. 2014), https://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf [https://perma.cc/J4PS-HCK8] ("One study found that 7% of college men admitted to committing rape or attempted rape, and 63% of these men admitted to committing multiple offenses, averaging six rapes each."); *see also* David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 73–82 (2002) (discussing method and results of study regarding repeat rape offenders in which participants were college students).

[6] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAMPUS CLIMATE SURVEY VALIDATION STUDY FINAL TECHNICAL REPORT 76 (Jan. 2016), https://www.bjs.gov/content/pub/pdf/ccsvsftr.pdf [https://perma.cc/DSG2-4EEZ]; U.S. SENATE SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, SEXUAL VIOLENCE ON CAMPUS 2 (July 2014), http://www.mccaskill.senate/gov/surveyreportwithappendix.pdf [https://perma.cc/394H-

the victim of a rape or attempted rape while at college than at any other time in her life.[7] A Department of Justice report concluded that a college with 10,000 females could experience more than 350 rapes a year.[8]

The statistics are not just limited to women. One in sixteen men also report being sexually assaulted during college.[9] The rate for members of the lesbian, gay, bisexual, and transgender (LGBT) community is estimated to be higher.[10]

The dynamics of college life create this troubling environment. The endless array of unsupervised social gatherings, number of single adults required to live on campus, availability of private dorm rooms, and large supply of drugs and alcohol on campus are all contributing factors.[11] These crimes often take place at parties.[12] Many victims are abused while they are intoxicated, under the influence of drugs, passed out, or otherwise incapacitated at these events.[13] Alcohol is the greatest contributing factor, as half of all college rapes are associated with alcohol use, whether knowingly or unknowingly consumed by the perpetrator or victim.[14] Even more concerning, most victims do not report these incidents to law enforcement officials.[15] On average, only about 12% of college female victims report the assault.[16] Forty-

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MTMZ]; Jake New, *Justice Department: 1 in 5 Women Sexually Assaulted in College*, INSIDE HIGHER ED (Jan. 21, 2016), https://www.insidehighered.com/quicktakes/2016/01/21/justice-department-1-5-women-sexually-assaulted-college [https://perma.cc/VE8H-TZMJ].

[7] CHRISTOPHER P. KREBS ET AL., NAT'L INST. OF JUSTICE, THE CAMPUS SEXUAL ASSAULT (CSA) STUDY 6-1 (Dec. 2007), https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf [https://perma.cc/58HA-3VXF]; Christopher P. Krebs et al., *College Women's Experiences with Physically Forced, Alcohol- or Other Drug-Enabled, and Drug-Facilitated Sexual Assault Before and Since Entering College*, 57 J. OF AM. C. HEALTH 639, 639–45 (2009).

[8] FISHER ET AL., *supra* note 4, at iii ("[This is] a finding with serious policy implications for college administrators.").

[9] NAT'L SEXUAL VIOLENCE RES. CTR., STATISTICS ABOUT SEXUAL VIOLENCE, http://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf [https://perma.cc/ZW63-MCKY]; *see also* KREBS ET AL., *supra* note 7, at 5-5.

[10] CATHERINE HILL & ELENA SILVA, DRAWING THE LINE: SEXUAL HARASSMENT ON CAMPUS 3 (Dec. 2005), http://history.aauw.org/files/2013/01/DTLFinal.pdf [https://perma.cc/S55W-RPTD].

[11] Farahany, *supra* note 1, at 20.

[12] KREBS ET AL., *supra* note 7, at 5-19.

[13] *See* DEAN G. KILPATRICK ET AL., MED. UNIV. OF S.C., DRUG-FACILITATED, INCAPACITATED, AND FORCIBLE RAPE: A NATIONAL STUDY 5, 11, 22 (Feb. 2007), https://www.ncjrs.gov/pdffiles1/nij/grants219181.pdf [https://perma.cc/47A2-SKK4].

[14] Antonia Abbey, *Alcohol-Related Sexual Assault: A Common Problem Among College Students*, 63 J. STUD. ON ALCOHOL (SUPPLEMENT 14) 118, 119 (2002).

[15] *Id.* at 118 (explaining that "the most methodologically rigorous study of sexual assault prevalence" found that only 5% of rape victims reported the incident to the police).

[16] KILPATRICK ET AL., *supra* note 13, at 3 ("Barriers to reporting rape incidents to law enforcement among college women included: not wanting others to know about the rape, fear of retaliation, perception of insufficient evidence, uncertainty about whether a crime

two percent tell no one.[17] Studies show that if students are drinking alcohol before the incident, victims of sexual assault are held more responsible by their peers.[18] These findings may help explain why only a little more than half of college women who have been sexually assaulted tell anyone at all about what happened.[19] Victims often anticipate blame rather than support, and so they remain silent about the incident.[20]

But silence doesn't prevent further harm. Sexual assault is a devastating experience that presents an ongoing harm to a victim's physical and emotional well-being and can affect academic performance and, ultimately, career path.[21] College sexual assault victims often suffer from mental health problems and drug and alcohol abuse which inhibits their ability to perform well in school.[22] Depression, anxiety, and substance abuse are all linked to higher college dropout rates.[23]

There has been a nationwide response to this problem,[24] but many issues remain unresolved.[25] There is uncertainty surrounding the extent of

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was committed or harm intended, and uncertainty about whether the incident was 'serious enough.'").

[17] Abbey, *supra* note 14, at 118.

[18] *Id.* at 124. The author looked at two separate studies that "asked male and female college students to read a story about a college woman raped by a guest while cleaning up after a party." *Id.* The participants were then asked to evaluate the stories. *Id.* The results showed that "[b]oth male and female students perceived [a male] perpetrator as less responsible when he was intoxicated," but viewed a female victim as "more responsible when she was intoxicated." *Id.* While the male perpetrator's alcohol consumption did not affect the students' perceptions of likeability or morality, the female victim's alcohol consumption did. *Id.* Ultimately, both studies concluded that victims of sexual assault were held more responsible by both male and female college students when they were intoxicated. *Id.*

[19] *See id.* at 118.

[20] *See id.* at 124.

[21] *See* Farahany, *supra* note 1, at 20; *see also* Elizabeth A. Yeater & William O'Donohue, *Sexual Assault Prevention Programs: Current Issues, Future Directions, and the Potential Efficacy of Interventions with Women*, 19 CLINICAL PSCYHOL. REV. 739, 740 (1999).

[22] *See generally* Daniel Eisenberg et al., *Mental Health and Academic Success in College*, 9 B.E. J. ECON. ANALYSIS & POL'Y, no. 1, 2009, at 1 (examining the association between mental health and academic outcomes in college).

[23] *Id.* at 2; *see also* AMELIA M. ARRIA ET AL., UNIV. OF MD. SCH. OF PUB. HEALTH, THE ACADEMIC OPPORTUNITY COSTS OF SUBSTANCE USE DURING COLLEGE 2 (May 2013), http://www.cls.umd.edu/docs/AcadOppCosts.pdf [https://perma.cc/8MQJ-ZXRJ] ("Longitudinal research has found that students who use alcohol and drugs are more likely to have disruptions in their enrollment in college and also fail to graduate.").

[24] *See, e.g.*, WHITE HOUSE COUNCIL ON WOMEN & GIRLS, *supra* note 5, at 19–32. In January 2014, President Obama established the White House Task Force to Protect Students from Sexual Assault with a mandate to strengthen federal enforcement efforts and provide schools with recommendations and resources to help reduce sexual violence on campus. Memorandum from Office of the Press Sec'y, The White House, Establishing a

institutional responsibility for these attacks.[26] The student–college relationship has shifted over the years, and universities have failed to provide appropriate responses to this ongoing, ever increasing problem.[27]

This Note will examine several theories of institutional liability, and will evaluate the effectiveness of each one separately in turn. Part II explores the history of the student–college relationship through the doctrine of *in loco parentis*, including both its introduction and dissolution. Since the collapse of *in loco parentis*, there have been a wide variety of judicial approaches. Part III examines common law theories of liability, including negligent misrepresentation, landowner–business invitee theory, and landlord–tenant theory. Part IV addresses the statutory imposition of a duty of disclosure. Part V examines the theory of Title IX discrimination as another means for holding universities responsible for failing to address campus rape properly. Part VI considers a multifaceted approach by university administrators, legislatures, and courts involving key foreseeability factors in the form of preventative measures that can be taken to not only decrease the occurrence of rapes on college campuses, but also the likelihood of institutional liability.

In each Part, examination of the cases dealing with institutional liability and the theories of law on which they are based will help evaluate what constitutes the student–college relationship, whether institutional liability should be imposed on colleges when rapes do occur on campuses, and what should be done about this widespread problem. To conclude, this Note will synthesize the evaluations made about each theory and compare each to find a multifaceted solution.

White House Task Force to Protect Students from Sexual Assault (Jan. 22, 2014), https://www.whitehouse.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a [https://perma.cc/YV73-KT5V].

[25] KILPATRICK ET AL., *supra* note 13, at 8; Deborah Tuerkheimer, *Rape on and off Campus*, 65 EMORY L.J. 1, 7 (2015) ("The massive institutional breakdown encompasses many components, including failure to encourage reporting; failure to provide adequate training to faculty, staff, and investigators; failure to provide adequate services for survivors; failure to coordinate with the efforts of law enforcement; and failure to comply with the requirements and best practices for adjudicating allegations." (citing deficiencies discussed in Senator McCaskill's Report)); Ross Douthat, *Stopping Campus Rape*, N.Y. TIMES (June 29, 2014), https://www.nytimes.com/2014/06/29/opinion/sunday/ross-douthat-stopping-campus-rape.html?_r=1 [https://perma.cc/M79L-AVM2] ("In the debate over sexual violence on college campuses, two things are reasonably clear. First, campus rape is a grave, persistent problem, shadowing rowdy state schools and cozy liberal-arts campuses alike. Second, nobody – neither anti-rape activists, nor their critics, nor the administrators caught in between – seems to have a clear and compelling idea of what to do about it.").

[26] *See* Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 490 (2012).

[27] *See* U.S. SENATE SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, *supra* note 6, at 1 ("[M]any institutions are failing to comply with the law and best practices in how they handle sexual violence among students.").

II. HISTORICAL TRENDS IN THE STUDENT–COLLEGE RELATIONSHIP

Students often begin college unprepared for the new freedoms offered absent parental supervision. In the early twentieth century, courts sought to mitigate these circumstances by establishing a special student–college relationship through the doctrine of *in loco parentis*.[28] *In loco parentis*, translated as "in the place of a parent,"[29] provides parental authority to college administrators to safeguard students' welfare.[30] Entrusting college administrators with parental decision making authority is key to determining the existence of a corresponding legal duty in the institutional liability context, as the exercise of legal authority can impose an obligatory duty to protect students from the actions of others.[31] This Part will explore the doctrine of *in loco parentis*, its introduction, legal application, and ultimate dissolution as a valid legal principle in the collegiate setting.

A. *The Introduction of* In Loco Parentis

The first court to explore the extent of a college's parental authority to oversee student welfare under the doctrine of *in loco parentis* suggested the imposition of a legal duty to also protect the physical welfare of students.[32] The critical issue in the 1913 Kentucky case of *Gott v. Berea* focused on Berea College's rule prohibiting its students from eating at restaurants outside of the university community.[33] The court reasoned that the institution, acting in the place of the parent, owed the restaurant owner no duty, and that the institution had the authority to create any regulations without court interference, provided the regulations were lawful or did not interfere with public policy.[34] Therefore,

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[28] Theodore C. Stamatakos, *The Doctrine of* In Loco Parentis*, Tort Liability and the Student-College Relationship*, 65 IND. L.J. 471, 473–88 (1990).

[29] *In loco parentis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[30] *See* Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 654–55 (1995) (recognizing that during the school day, a teacher or administrator, may act *in loco parentis*).

[31] *See* Stamatakos, *supra* note 28, at 474 (noting that the doctrine of *in loco parentis* permits colleges to create, execute, and oversee student-discipline measures and to nurture students' physical and moral welfare).

[32] *Id.*

[33] *See generally* Gott v. Berea Coll., 161 S.W. 204, 205 (Ky. 1913) (upholding the college's authority to enforce a rule forbidding students to enter eating houses and places of amusement not controlled by the college). A local business owner, whose restaurant students had frequented in the past, argued that the college's refusal to allow students to eat at his establishment had caused him injury. *Id.* at 205. In response, Berea College asserted that the institution was compelled, from time to time, to pass rules that prohibited "the doing of things not in themselves wrong or unlawful, but which the governing authorities ha[d] found and believe[d] detrimental to the best interest of the college and the student body." *Id.* at 206.

[34] *Id.*

as colleges exercised parental authority over students, a corresponding legal duty to protect students over that exercise of authority was recognized.[35]

B. *The Dissolution of* In Loco Parentis

The legal application of *in loco parentis* as an obligatory administrative shield against third party conduct was dissolved during the tumultuous 1960s,[36] which brought evolving social customs and attitudes at colleges and universities nationwide.[37] During a decade witnessing frequent and demonstrative assertions of rights and independence and the introduction of the Twenty-Sixth Amendment,[38] the doctrine of *in loco parentis* was found ill-fitting and subsequently nullified in 1960s case law.[39] Soon after, the United States Supreme Court acknowledged college students as adults,[40] sounding the death knell for the antiquated doctrine.

Students' newfound autonomy also freed universities in the institutional liability context.[41] Students could no longer assert the doctrine of *in loco*

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[35] Stamatakos, *supra* note 28, at 474; *see also* Waugh v. Bd. of Trs. of Univ. of Miss., 237 U.S. 589, 591–97 (1915) (affirming the constitutionality of the *in loco parentis* authority of the university to govern the social conduct of its students by enforcing a state regulation forbidding university students to join fraternities); John B. Stetson Univ. v. Hunt, 102 So. 637, 639–41 (Fla. 1924) (in banc) (supporting the university's authority to regulate the welfare of its students by reversing a judgment against the university for suspending a student who caused disturbances in the dormitory); Tanton v. McKenney, 197 N.W. 510, 511–13 (Mich. 1924) (recognizing a college's discretionary authority to determine disciplinary policies by upholding the constitutionality of the college's refusal to readmit a student who violated its prohibition against cigarette smoking on public streets).

[36] *See* Buttny v. Smiley, 281 F. Supp. 280, 286 (D. Colo. 1968) ("[T]he doctrine of 'In Loco Parentis' is no longer tenable in a university community . . . ."); Goldberg v. Regents of the Univ. of Cal., 57 Cal. Rptr. 463, 876 (Ct. App. 1967) ("[U]niversities should no longer stand in loco parentis in relation to their students.").

[37] *See* Michael C. Griffaton, *Forewarned Is Forearmed: The Crime Awareness and Campus Security Act of 1990 and the Future of Institutional Liability for Student Victimization*, 43 CASE W. RES. L. REV. 525, 538 (1993).

[38] U.S. CONST. amend. XXVI (lowering the age of majority from 21 to 18); Griffaton, *supra* note 37, at 538.

[39] Michael Clay Smith, Commentary, *College Liability Resulting from Campus Crime: Resurrection for* In Loco Parentis*?*, 59 W. EDUC. L. REP. 1, 1 (1990) ("The venerable old doctrine, which for so long had justified the comprehensive authority of professor and college over student, had fallen weak during the 1960s under a steady decline in parental authority, but the immediate cause of death was an expanded concept of individual liberties, complicated by a lowered age of majority.").

[40] Healy v. James, 408 U.S. 169, 197 (1972) (Douglas, J., concurring) ("Students—who, by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age—are adults who are members of the college or university community.").

[41] *See* Kelley W. Bhirdo, Note, *The Liability and Responsibility of Institutions of Higher Education for the On-Campus Victimization of Students*, 16 J.C. & U.L. 119, 122 (1989).

parentis for a university's failure to protect against their injuries.[42] Yet it was students who failed to cut the apron strings entirely. Although they demanded their independence, they still insisted on institutional protection from third party harm.[43] Students continued asserting liability under various tort theories.[44]

Courts refused to allow students both the freedoms of adulthood and the safety net of the institutional parent.[45] The Third Circuit's decision in *Bradshaw v. Rawlings* articulated two fundamental policy considerations concerning student–college tort cases: (1) "a recognition that the modern American college is not an insurer of the safety of its students,"[46] and (2) the notion that "society considers the modern college student an adult, not a child of tender years."[47] The court's purpose was clear: less authority equals less liability.[48] Thus, the doctrine of *in loco parentis* was overthrown and dismissed by the courts.

The dissolution of the *in loco parentis* doctrine fundamentally changed the institutional liability landscape. To determine liability, courts and college administrators must seek different theories upon which to base the student–college relationship. A college owes no duty to its students unless a special relationship exists.[49] At issue is the extension of a college's legal duty to protect students against reasonably foreseeable criminal activity. Courts are hesitant to create firm guidelines and are continuously reexamining the contours of the student–college relationship.

III. COMMON LAW THEORIES OF LIABILITY

Undeterred by the dissolution of *in loco parentis*, some courts intuitively assign a higher level of accountability to colleges based on the existence of a special student–college relationship.[50] Courts have accepted conditions

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[42] George L. Stewart II, Comment, *Social Host Liability on Campus: Taking the "High" Out of Higher Education*, 92 DICK. L. REV. 665, 673 (1988).

[43] Bhirdo, *supra* note 41, at 122 ("Although they demanded their autonomy as adults, they still expected the college to protect them from themselves and the actions of others.").

[44] *Id.*; *see also infra* Part III.

[45] Bhirdo, *supra* note 41, at 122.

[46] Bradshaw v. Rawlings, 612 F.2d 135, 138 (3d Cir. 1979).

[47] *Id.* at 140.

[48] *See id.* at 138–40.

[49] *See* Stamatakos, *supra* note 28, at 472–73, 472 n.7 (discussing the special relationships described in RESTATEMENT (SECOND) OF TORTS § 314A (AM. LAW INST. 1965) and its caveat that "[t]he Institute expresses no opinion as to whether there may not be other relations which impose a similar duty" (alteration in original) (quoting *id.* § 314A caveat)).

[50] Mullins v. Pine Manor Coll., 449 N.E.2d 331, 335–36 (Mass. 1983) ("Of course, changes in college life, reflected in the general decline of the theory that a college stands in loco parentis to its students, arguably cut against [colleges assuming responsibility for students' safety]. The fact that a college need not police the morals of its resident students,

outlined in the Restatement (Second) and applied its principles to common law theories of liability.[51] These common law theories include negligent misrepresentation,[52] landlord–tenant theory,[53] and landowner–business invitee theory.[54] In order to prove liability under these theories, the plaintiff must establish: (1) that the college owed a duty to its students, (2) it breached that duty, and (3) breaching that duty proximately caused (4) the student's injury.[55] These fundamental principles of institutional liability will be addressed in further detail by cases that use the elements of negligence to determine whether colleges and universities owe a duty to their students to help protect them from or prevent the harmful activities of others.[56] The cases will illustrate that success is fact specific based on foreseeability. Foreseeability,[57] or the reasonable anticipation that harm or injury is a likely result of acts or omissions, is the benchmark for institutional liability as put forth under the common law theories of liability available to victims of rape on college campuses.[58] Each theory provides a basis for the existence of a special student–college relationship and a corresponding legal duty to protect students from third party harm.

A. *Negligent Misrepresentation*

One potential theory of liability against schools is negligent misrepresentation. If a college advertises that it has a safe campus and does not disclose information about on-campus crime, it may be held liable for negligent misrepresentation.[59] These representations could be made during

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however, does not entitle it to abandon any effort to ensure their physical safety. Parents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm." (footnote omitted)).

[51] *See infra* Part III.A.–.C.; *see also* RESTATEMENT (SECOND) OF TORTS §§ 323, 344.

[52] RESTATEMENT (SECOND) OF TORTS § 311; Griffaton, *supra* note 37, at 541 (considering that because laws now "require campus crime statistics and security procedures to be divulged in a suitable manner, a college may also be found liable for common law fraud or negligent misrepresentation if its catalogs or brochures are fraudulent or misleading" (footnotes omitted)).

[53] RESTATEMENT (SECOND) OF TORTS § 344; CAROL BOHMER & ANDREA PARROT, SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION 146–47 (1993).

[54] RESTATEMENT (SECOND) OF TORTS § 344; BOHMER & PARROT, *supra* note 53, at 145–46.

[55] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164–65 (5th ed. 1984).

[56] *See infra* Part III.A.

[57] *Foreseeability*, BLACK'S LAW DICTIONARY, *supra* note 29.

[58] *See infra* Part IV.A.

[59] Griffaton, *supra* note 37, at 541.

orientations, through admissions materials, or through other statements and brochures colleges may distribute.[60]

Colleges and universities have a duty to report the nature and extent of crimes on their campuses. For example, in *Duarte v. State*, the California Court of Appeals found a university liable for the rape and murder of a female student because of its failure to disclose knowledge of prior crimes in the area.[61] The university expressly and impliedly represented that the housing facilities were reasonably safe and secure for their occupants.[62]

As a result of these representations, the victim, Gardini, entered California State University at San Diego as a freshman and arranged for living accommodations at a campus dormitory facility operated by the university.[63] Duarte, Gardini's mother, relied upon such representations and, therefore, took no additional steps to provide further security measures for her daughter.[64] What the university did not tell Duarte was that it was aware of an escalating pattern of violent acts against female students on campus and had failed to take preventative measures to reduce the risk of harm or to disclose these crimes to the university community.[65]

Considering the university's knowledge of this existing pattern, the court reasoned that Gardini was not the victim of an "unexpected outburst."[66] The university could have reasonably foreseen that violent crime would occur on its campus.[67] Foreseeability is present, noted the court, when the institution has prior knowledge of similar criminal activity on its campus, and the university was well-aware of previous crimes.[68]

Despite this knowledge, the university represented itself to the community as an institution of higher learning offering a safe environment to its students.[69] The university was negligent in failing to provide adequate security for its students based on the representations it made to both the students and their families, such as those made to Duarte.[70] The court concluded that such negligence was the proximate cause of Gardini's murder.[71]

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[60] *Id.* at 541 (discussing liability for "negligent misrepresentation if its catalogs or brochures are fraudulent or misleading" (footnote omitted)).

[61] Duarte v. State, 151 Cal. Rptr. 727, 735 (Ct. App. 1979).

[62] *Id.*

[63] *Id.* at 729, 735.

[64] *Id.* at 729.

[65] *Id.*

[66] *Id.* at 735.

[67] *Duarte*, 151 Cal. Rptr. at 735.

[68] *Id.* The court noted that by failing "to institute reasonable means within their power of accomplishment" the University increased the "likelihood of Tanya becoming a rape victim." *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

B. *Landlord–Tenant Theory*

Another theory under which colleges and universities may be held liable is landlord–tenant theory. This theory is based on the presumption that, because students live in university housing, the university functions as its students' landlord.[72] Although a landlord is not obligated to protect a tenant or the premises following the transfer of possession of the property,[73] as a landlord, the university still has a legal duty to warn student-tenants of reasonably foreseeable, dangerous conditions on the premises.[74] Under this theory, courts can hold the university, in its capacity as landlord, responsible for exercising reasonable care and warning students about dangerous conditions that are foreseeable on campus. As one state court reasoned, a university has the discretion to choose whether it is a landlord furnishing housing to its students in competition with private landlords.[75] Once the decision to furnish housing is made, a university owes its students a duty of reasonable care to protect them from foreseeable harm.[76]

The landmark case that recognized this special exception to the landlord–tenant relationship was *Mullins v. Pine Manor College*, where the court determined that the relationship between colleges and their students is distinct from other landlord–tenant relationships.[77] Mullins was forcibly taken from her dorm room in the middle of the night by an unknown assailant, led to an unlocked dining hall, and raped.[78] The court reasoned that the population of young adults, "especially young women, on a college campus creates" a likelihood of criminal misconduct.[79] The court further determined that the threat of criminal acts against resident students is "self-evident," and to the extent that threat was foreseeable, the college was required to take reasonable measures to guard against those acts.[80]

The *Mullins* court believed that, despite the decline of *in loco parentis*, colleges were not entitled to abandon all responsibility for the safety of their students.[81] Using this rationale, the court determined the college had a duty to take steps to ensure the safety of its students; it failed to perform that duty; and that failure was the proximate cause of Mullins's injuries.[82] Not only must a college take security precautions, those precautions must be adequately

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[72] *See, e.g.*, Nero v. Kan. State Univ., 861 P.2d 768 (Kan. 1993) (finding the existence of a landlord–tenant relationship when a university provides housing to its students).

[73] KEETON ET AL., *supra* note 55, § 63, at 434.

[74] *Id.* § 63, at 436.

[75] *Nero*, 861 P.2d at 779.

[76] *Id.*

[77] Mullins v. Pine Manor Coll., 449 N.E.2d 331, 337 (Mass. 1983).

[78] *Id.* at 334.

[79] *Id.* at 335.

[80] *Id.*

[81] *Id.* at 335–36.

[82] *Id.* at 337–38, 341.

implemented.[83] Had the college installed adequate security devices and prevented easy access to its residence halls and facilities, Mullins's rape would not have occurred.[84]

A further examination of the landlord–tenant relationship occurred in *Stanton v. University of Maine*.[85] Stanton met a young man at a party, who later walked her back to her dormitory.[86] She propped the door open after returning to her room.[87] The young man used the opportunity to enter the room and sexually assault her.[88]

Stanton alleged that the university had a duty to warn her of possible dangerous activities on campus and to provide her with an explanation of the university security measures in place.[89] By failing to do so, the university breached its duty, and that breach was the proximate cause of her injuries.[90] Notwithstanding the university demonstrating the last reported rape occurred six years prior to Stanton's assault, the court reasoned sexual assault in Stanton's on-campus dorm room was foreseeable, as evidenced by the security measures implemented by the university.[91] Citing *Mullins*, the *Stanton* court determined that "foreseeability was not dependent upon evidence of prior criminal acts," but that "the precautions taken by the College to protect students against criminal activities" would appear illogical unless the criminal activities were foreseeable.[92] The court found a sufficient basis for imposing a duty on the university to reasonably protect its resident students against the foreseeable criminal acts of third parties by providing warnings and advising them of steps to improve their personal safety.[93] The *Stanton* court's reasoning highlighted a big movement in common law theory, as the court reduced the foreseeability threshold. The court took the facts of the case and went one step further in its analysis by concluding rape can be foreseeable on campus, even if rape incidents have not previously occurred on campus.[94]

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[83] *Mullins*, 449 N.E.2d at 338.

[84] *Id.* at 339–41.

[85] Stanton v. Univ. of Me. Sys., 773 A.2d 1045 (Me. 2001).

[86] *Id.* at 1048.

[87] *Id.*

[88] *Id.*

[89] *Id.* at 1049–50.

[90] *Id.* at 1049.

[91] *Stanton*, 773 A.2d at 1049–50.

[92] *Id.* at 1050 (citing Mullins v. Pine Manor Coll., 449 N.E.2d 331, 337 (Mass. 1983)).

[93] *Id.*; *see also Mullins*, 449 N.E.2d at 337 ("Colleges must, therefore, act 'to use reasonable care to prevent injury' to their students 'by third persons whether their acts were accidental, negligent, or intentional.' We reject the argument advanced by the college . . . that the criminal attack here was not foreseeable. . . . The director of student affairs . . . warned students during freshman orientation of the dangers inherent in being housed at a women's college near a metropolitan area . . . . The risk of such a criminal act was not only foreseeable but was actually foreseen." (citation omitted) (quoting Carey v. New Yorker of Worcester, Inc., 245 N.E.2d 420, 422 (Mass. 1969))).

[94] *Stanton*, 773 A.2d at 1050; *see also Mullins*, 449 N.E.2d at 337.

In *Miller v. State*, the university's duty to its resident students was also compared with the duty imposed upon a landlord with respect to his or her tenants.[95] Miller, a student at the State University of New York at Stony Brook, was attacked in her dorm's laundry room by an unknown man with a large butcher knife.[96] She was blindfolded, forced from the room, and up the stairs to a vacant dormitory room where she was raped twice by her assailant.[97]

The court found that the university had breached its duty as the students' landlord to protect them as tenants from the reasonably foreseeable likelihood of criminal assaults by failing to lock the outer doors to its residence halls.[98] This decision was made notwithstanding complaints from students of crimes, including rape, in other campus dormitories.[99] That failure was the proximate cause of Miller's injuries.[100] Because the assault was foreseeable and the university had failed to provide adequate security, the university was found liable for her injuries.[101]

C. *Landowner–Business Invitee Theory*

The student–college relationship can also be characterized as that of a landowner and its business invitee.[102] The North Carolina Court of Appeals examined the landowner–business invitee relationship in *Brown v. North Carolina Wesleyan College*.[103] Brown, one of the school's cheerleaders, was abducted from a basketball game on campus, along with two other cheerleaders, and forced to drive to a remote location where she was raped and murdered.[104] The Brown estate filed a wrongful death suit against the college as a landowner, alleging it was negligent in allowing the incident to occur.[105]

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[95] Miller v. State, 467 N.E.2d 493, 494 (N.Y. 1984).

[96] *Id.*

[97] *Id.*

[98] *Id.* at 494–95.

[99] *Id.*

[100] *Id.* at 497.

[101] *Miller*, 467 N.E.2d at 497.

[102] *See* RESTATEMENT (SECOND) OF TORTS § 344 (AM. LAW INST. 1965) ("A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise protect them against it.").

[103] Brown v. N.C. Wesleyan Coll., Inc., 309 S.E.2d 701, 702 (N.C. Ct. App. 1983).

[104] *Id.* at 701.

[105] *Id.* at 702. The estate alleged that the school

> was negligent in that it (a) allowed people which it knew or should have known to have unsavory character and dangerous propensities to loiter on its campus; (b) knew or should have known of [the assailant's] presence on its campus, and failed to require

The court determined that institutional liability could exist in certain circumstances involving a third party criminal assault against a student, but further reasoned that foreseeability of the assault would determine whether a corresponding legal duty exists to safeguard against such incidents.[106] The Court of Appeals held, however, that because North Carolina Wesleyan College had only arbitrary incidents of minor crimes, such as vandalism, and only one attempted rape in the two years preceding Brown's death, the college owed no duty to Brown to keep the campus safe.[107] In light of the school's security measures, it could not be held liable for negligence.[108]

In contrast, the fact pattern in *Johnson v. State* showed that criminal activities at Washington State University were not merely scattered incidents, and that under the landowner–business invitee relationship, the university had a duty to warn students of the danger of potential sexual assaults on women.[109] Johnson, a student, was abducted and raped while attempting to gain access to her dormitory late at night.[110] Johnson presented evidence showing that on an annual basis, numerous crimes had taken place on campus in the years prior to her attack.[111] The evidence proved that Johnson's rape was in fact foreseeable.[112] Washington State University argued that it was not liable due to the intervening criminal act of the third party rapist.[113] The Court of Appeals of Washington did not agree and held that the criminal act could not be an intervening cause if it was reasonably foreseeable based on prior criminal acts.[114]

The Supreme Court of California also recognized a special relationship of landowner–business invitee between the university and the student, in *Peterson v. San Francisco Community College District*.[115] This special relationship imposed a legal duty to warn students of dangerous, foreseeable

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> him to leave; (c) failed to adequately light and keep in a reasonably safe condition its parking lots and commons areas; (d) violated its duty to exercise due care by failing to provide adequate security for its students within its common areas and parking lots; (e) violated its duty to exercise due care in protecting its students from foreseeable criminal assaults by third persons on the common premises; and (f) violated its duty to warn [Brown] of the dangerous conditions on its campus.

Id.

[106] *Id.* at 703.

[107] *Id.*

[108] *Id.*

[109] Johnson v. State, 894 P.2d 1366, 1370–71 (Wash. Ct. App. 1995).

[110] *Id.* at 1368, 1370.

[111] *Id.* at 1371.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193, 1194 (Cal. 1984).

third party acts.[116] Peterson alleged that certain "circumstances placed upon the defendants an affirmative duty to exercise due care for her protection."[117]

Because the same type of attack had occurred prior to the assault on Peterson, the Supreme Court of California reasoned that the college was aware that women using the parking facility were in danger of further attacks.[118] The court declared that this knowledge imposed a duty upon the university to protect its students.[119] The court held that the district could be held liable for breach of duty.[120]

In another landowner–business invitee case, *Delta Tau Delta v. Johnson*, the court turned to the "totality of the circumstances test," which determines whether a third party's criminal act against a landowner's invitee is foreseeable, which in turn determines whether the landowner has a duty of care to protect the invitee from the act.[121] Under this test, a court takes into account all of the circumstances involving the incident, including prior similar incidents in making a foreseeability determination.[122] Johnson, a student at Indiana University, was sexually assaulted by an alumnus of the school's Delta Tau Delta fraternity chapter.[123] During a party at the chapter's fraternity house, Johnson and a Delta Tau Delta alumnus member had several alcoholic drinks together.[124] At the end of the night, the alumnus offered her a ride home, but only after he regained his sobriety.[125] Johnson accepted this offer, and they waited together in a private room.[126] But before leaving the party, he locked the door and raped her.[127]

Two years prior to this incident, there had been similar instances of alcohol abuse at the Indiana University campus, in which female students were

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[116] Griffaton, *supra* note 37, at 542.

[117] *Peterson*, 685 P.2d at 1195–96 ("Having invited [her] onto the campus property, having enrolled her as a student, having issued to [her] a permit to park and use the parking lot and stairway in question in exchange for . . . payment of a fee, having undertaken to patrol the parking lot and stairway in question in the light of the prior incidents of violence in the area, and having induced [her] to rely and depend upon this protection, a special relationship existed between Plaintiff and Defendants pursuant to which Defendants were obliged to take reasonable protective measures to ensure Plaintiff's safety against violent attacks and otherwise protect her from foreseeable criminal conduct and/or to warn her as to the location of prior violent assaults in the vicinity of the subject parking lot and stairway." (alterations in original)).

[118] *Id.* at 1201–02.

[119] *Id.*

[120] *Id.* at 1194.

[121] Delta Tau Delta v. Johnson, 712 N.E.2d 968, 972–73 (Ind. 1999), *abrogated by* Rogers v. Martin, 63 N.E.3d 316 (Ind. 2016).

[122] *Id.* at 972.

[123] *Id.* at 970.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Delta Tau Delta*, 712 N.E.2d at 970.

assaulted at fraternity parties by the fraternity's members.[128] The month before Johnson's assault, Delta Tau Delta's national headquarters had sent its chapters a series of informational posters on the high incidents of campus rape involving drug and alcohol use to hang for public viewing.[129] Employing the totality of the circumstances test, the Supreme Court of Indiana ruled that Delta Tau Delta owed Johnson a duty of reasonable care, as articulated in the landowner–business invitee relationship, "to protect her from a foreseeable sexual assault."[130]

It is important to note that Johnson filed suit against Delta Tau Delta rather than the university, because the fraternity was the landowner.[131] Courts have reasoned that universities do not owe a duty to students to protect them from third party attacks in fraternity settings, if the university is not the landowner.[132] These courts have determined that universities cannot be held liable "for non-curricular activities taking place on property not owned by the [university]."[133]

The cases examined in this Part suggest that foreseeability in the landowner–business invitee context differs from the landlord–tenant relationship. As a landowner, a university's duty to warn or protect emerges only when third party criminal activity is reasonably foreseeable based on evidence of past crimes.[134] Unlike the cases presented under the landlord–tenant theory, the university must have prior knowledge of similar criminal activity on campus to be liable for student injuries.[135]

IV. STATUTORY DUTY OF DISCLOSURE IMPOSED

One case that has had significant impact concerning institutional liability is the case of Jeanne Ann Clery. In 1986, at Lehigh University, nineteen-year-old Clery was brutally raped and murdered in her dormitory room by a fellow student.[136] Her killer was a drug and alcohol abuser known for his violent

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[128] *Id.* at 973.

[129] *Id.* at 975.

[130] *Id.* at 974. The court reasoned that,

> [w]hile this may be the exceptional case wherein a landowner in a social host situation is held to have a duty to take reasonable care to protect an invitee from the criminal acts of another, when the landowner is in a position to take reasonable precautions to protect his guest from a foreseeable criminal act, courts should not hesitate to hold that a duty exists.

Id. (footnote omitted).

[131] *See id.* at n.4.

[132] *See* Leonardi v. Bradley Univ., 625 N.E.2d 431, 436 (Ill. App. Ct. 1993).

[133] *Id.* (citing Hartman v. Bethany Coll., 778 F. Supp. 286, 291 (N.D.W. Va. 1991)).

[134] *E.g.*, Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193, 1194, 1201–02 (Cal. 1984).

[135] *E.g.*, *id.* at 1198–99.

[136] Denise Kalette, *New Law Ends Parents' Tragic Battle*, USA TODAY, Nov. 12, 1990, at 1D; *see also* Ken Gross & Andrea Fine, *After Their Daughter Is Murdered at*

temper, whom Clery had never met.[137] After a night of heavy drinking, Clery's killer gained access to her room by proceeding, unopposed, through three propped-open doors.[138] Each of the doors had automatic locks, but they were left open that night.[139]

After her death, Clery's parents successfully lobbied the Pennsylvania legislature to increase student awareness of campus crime;[140] and in 1990, the Student Right to Know and Campus Security Act of 1990,[141] now referred to as the Clery Act, was signed into federal law.[142] The Clery Act mandates that all colleges and universities receiving federal funding annually report all campus crime statistics for the preceding three years and the security measures implemented to improve campus safety.[143]

These reports must be available to all current university students and employees, and if requested, to prospective students and employees.[144] Universities are also required to provide "timely" reports or notifications concerning crimes that present an ongoing threat to the university community.[145] The statute emphasizes that "[u]pon a determination . . . that an institution of higher education has substantially misrepresented the number, location, or nature of the crimes required to be reported under this subsection, . . . a civil penalty [shall be imposed] upon the institution."[146] It is also important to note that the Clery Act specifically exempts an institution,

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College, Her Grieving Parents Mount a Crusade for Campus Safety, PEOPLE (Feb. 19, 1990), http://people.com/archive/after-their-daughter-is-murdered-at-college-her-grieving-parents-mount-a-crusade-for-campus-safety-vol-33-no-7/ [https://perma.cc/UY2R-K3U3].

[137] Gross & Fine, *supra* note 136 (describing how the assailant went on a "drinking binge" in response to losing a campus election).

[138] *Id.*

[139] *Id.*

[140] *See* 1988 Pa. Laws 448; *see also* Bonnie S. Fisher et al., *Making Campuses Safer for Students: The Clery Act as a Symbolic Legal Reform*, 32 STETSON L. REV. 61, 62 (2002) ("Pennsylvania became the first state to pass a campus-security reporting law."); Bhirdo, *supra* note 41, at 130.

[141] Student Right-to-Know and Campus Security Act, Pub. L. No. 101-542, sec. 204, § 485, 104 Stat. 2381, 2385–87 (1990) (codified as amended at 20 U.S.C. § 1092(f) (2012 & Supp. II 2014)).

[142] This piece of legislation is designed to "ensure[] that students and employees at institutions of higher education are aware of crimes committed on campus and are familiar with security policies and procedures." 136 CONG. REC. H 11,500 (daily ed. Oct. 22, 1990) (statement of Rep. Coleman); *see also Legislative History: Clery Act History by Year (1989-2012)*, CLERY CTR. FOR SECURITY ON CAMPUS, http://clerycenter.org/legislative-history [https://perma.cc/BX7J-L6UD]. Connie and Howard Clery founded the Clery Center for Security on Campus with monies received from the out-of-court settlement they received from Lehigh University. SLOAN & FISHER, *supra* note 3, at 118.

[143] 20 U.S.C. § 1092(f)(1).

[144] *Id.*

[145] *Id.* § 1092(f)(3).

[146] *Id.* § 1092(f)(13).

and any of its employees, from civil liability, and does not establish a standard of care.[147]

The Violence Against Women Reauthorization Act (VAWA) of 2013[148] amended the Clery Act to mandate that schools develop new initiatives to respond to domestic violence, dating violence, sexual assault, and stalking under the Campus Sexual Violence Elimination Act (Campus SaVE Act).[149] The new law strengthens existing provisions in the Clery Act, requiring institutions to bolster prevention education programs for students and employees, and to establish procedures for responding to incidents of sexual violence on campus.[150] The VAWA also requires universities to institute policies identifying resources to assist sexual assault victims in continuing their education in a safe environment.[151]

With the widespread use of electronic devices, the notification requirements of the Clery Act can be more easily met.[152] Shortly after a crime is reported, universities are sending "Public Safety Notice" email notifications with details regarding the nature and scene of the crime, along with a description of the suspect.[153] The purpose of these email notifications is to provide members of the university community with information necessary to take appropriate precautions, to enable increased safety actions, and to aid in prevention of similar crimes.[154]

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[147] *Id.* § 1092(f)(14)(A).

[148] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 304, § 485(f), 127 Stat. 54, 89–92 (codified at 20 U.S.C. § 1092(f)).

[149] Campus Sexual Violence Elimination Act, H.R. 812, 113th Cong. (2013); *The Campus Sexual Violence Elimination (SaVE) Act*, CLERY CTR. FOR SECURITY ON CAMPUS, http://clerycenter.org/campus-sexual-violence-elimination-save-act [https://perma.cc/KU72-NAJC].

[150] Lauren P. Schroeder, Comment, *Cracks in the Ivory Tower: How the Campus Sexual Violence Elimination Act Can Protect Students From Sexual Assault*, 45 LOY. U. CHI. L.J. 1195, 1225–28 (2014).

[151] *See* 34 C.F.R. § 668.46 (2016).

[152] *See* U.S. DEP'T OF EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING 100 (Feb. 2011), https://www2.ed.gov/admins/lead/safety/handbook.pdf [https://perma.cc/EWK8-K8A8]; *see also* 20 U.S.C. § 1092(f)(1)(J) (requiring "[a] statement of current campus policies regarding immediate emergency response and evacuation procedures, including the use of electronic and cellular communication (if appropriate), which policies shall include procedures to—(i) immediately notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or staff occurring on the campus, . . . unless issuing a notification will compromise efforts to contain the emergency; (ii) publicize emergency response and evacuation procedures on an annual basis in a manner designed to reach students and staff; and (iii) test emergency response and evacuation procedures on an annual basis").

[153] *See, e.g.*, *Clery Act: Public Safety Notice (Timely Warning) Policy*, OHIO ST. U., https://dps.osu.edu/clery-act [https://perma.cc/6TWA-GHUX].

[154] *Id.*

While increased access to information provides increased transparency and safety, it can also increase a college's potential liability for student injuries. These statutes can be used to develop information on prior criminal acts on campus and can also be used as evidence of a university's knowledge of reasonably foreseeable criminal acts.[155] The statutes provide no guidance for determining foreseeability, leaving the courts to render judgment on a case-by-case basis.[156]

V. TITLE IX

Though the Clery Act exempts academic institutions from civil liability, students may claim liability against a college or university under Title IX, the federal statute designed to eliminate sex discrimination at institutions receiving federal aid.[157] Although originally directed at discrimination in intercollegiate athletics, the statute's language is broad enough to apply to colleges and universities that discriminate against female students by failing to properly address sex discrimination involving campus rape.[158] Title IX mandates that any recipient of federal funds cannot discriminate on the basis of sex.[159] Therefore, Title IX applies to all educational institutions receiving federal funds, which includes almost all colleges and universities nationwide.[160]

The Office of Civil Rights (OCR), a division of the Department of Education (DOE), is responsible for enforcing DOE regulations under Title IX.[161] The DOE regulations require institutions to create and publish grievance procedures that promptly address and redress sex discrimination complaints.[162] Each institution must also designate someone to manage the institution's compliance efforts.[163]

A. *Institutional Compliance*

Title IX provides two options for protecting individuals against sex discrimination in educational institutions: voluntary compliance or federal

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[155] Griffaton, *supra* note 37, at 540.

[156] *Id.*

[157] *See generally* 20 U.S.C. § 1681 (2012).

[158] *See* Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 208–09, 225 (2011).

[159] 20 U.S.C. § 1681(a).

[160] Robert Shibley, *Time to Call the Cops: Title IX Has Failed Campus Sexual Assault*, TIME (Dec. 1, 2014), http://time.com/3612667/campus-sexual-assault-uva-rape-title-ix/ [https://perma.cc/WKL2-LH8C].

[161] *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html [https://perma.cc/KN7A-2TP9] (last revised Apr. 2015).

[162] 34 C.F.R. § 106.8(b) (2016).

[163] *Id.* § 106.8(a).

funding termination.[164] Individuals who believe they may have suffered sex discrimination at an institution may file a complaint under the school's grievance procedure; otherwise, they have 180 days to notify the DOE of the sex discrimination and subsequently file a complaint.[165] Complaints may include both a substantive claim of the actual sex discrimination and a procedural claim that the institution failed to address the complaint properly.[166] After a complaint is filed with the DOE, the OCR reviews the complaint and investigates whether or not the institution violated Title IX or its enforcement regulations.[167] If the OCR determines that no violation occurred, then no further action is taken against the institution.[168] But if the OCR determines that the institution was in violation of Title IX, then the OCR seeks voluntary compliance.[169]

If an institution refuses to comply with Title IX after informal negotiations, the OCR has the option to begin administrative proceedings against the institution.[170] These proceedings may include a hearing, a review by the OCR's Reviewing Authority, and a final review by the Secretary of Education.[171] While administrative proceedings do not provide a victim with any personal compensation, administrative proceedings can result in a finding that the institution's federal funding may be terminated.[172]

B. *Private Right of Action*

In contrast to administrative proceedings conducted by regulatory agencies, such as the OCR, federal courts have allowed victims to seek compensatory and punitive damages and attorneys' fees. *Cannon v. University of Chicago* established that an individual can maintain a private right of action against an institution for violation of Title IX.[173] The Supreme Court reasoned that a private right of action, as opposed to the termination of federal funding, would be more practical in redressing isolated sexual discrimination incidents at institutions, would further efforts to end sex discrimination at institutions of higher learning, and would not undermine the statute's overall purpose.[174] By allowing a private right of action, individuals would receive effective

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[164] *See id.* § 100.8.
[165] *Id.* § 100.7(b).
[166] Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2145 (1993).
[167] 34 C.F.R. § 100.7(c).
[168] *Id.* § 100.7(d)(2).
[169] *Id.* § 100.7(d)(1).
[170] *Id.* §§ 100.7(d)(1), .8(a).
[171] *Id.* §§ 100.8(c), .9–.10.
[172] *See* 20 U.S.C. § 1682 (2012); 34 C.F.R. § 100.8(a)–(c).
[173] Cannon v. Univ. of Chi., 441 U.S. 677, 688–89, 709 (1979).
[174] *Id.* at 704–08.

protection against discriminatory acts while simultaneously guaranteeing systematic statutory enforcement.[175]

Title IX cases involving campus sexual assault require the plaintiff to prove that the institution (1) had actual knowledge of the harassment, (2) failed to respond or responded with deliberate indifference, (3) had "substantial control" over both the harasser and where the incident took place, and (4) the harassment must have been "so severe, pervasive, and objectively offensive that it denies its victims the equal access to education [and accompanying institutional opportunities and benefits] that Title IX is designed to protect."[176] By failing to appropriately respond to student rape allegations, a school can further aggravate the injury during the aftermath of the incident.[177]

C. *Hostile Collegiate Environment*

The concept of a hostile collegiate environment is illustrated in *Kelly v. Yale University*.[178] While attending Yale, Kelly was sexually assaulted by another student on campus.[179] Following her attack, Kelly filed a formal written complaint with the university, describing the existence of a hostile environment after her assault and requesting that the school take immediate action.[180] In particular, she requested that her attacker be removed from a class in which they were both enrolled.[181] In response to her complaint, the university's "Sexual Harassment Committee researched the incident, held a hearing," submitted a report to the dean, concluded a sexual violation had occurred, and recommended her attacker take a leave of absence—at least until after the semester after Kelly's expected graduation.[182] The committee did not provide this recommendation, though, until months after Kelly's complaint.[183]

Kelly claimed that after the assault, her attacker's continued presence on campus and the risk she might see or interact with him, deprived her of the institution's educational benefits or opportunities.[184] Despite repeatedly making requests for accommodation following the assault, the university failed to respond.[185] Yale's failure to appropriately respond exposed Kelly to the

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[175] *Id.*

[176] *See, e.g.*, Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 642, 645, 652 (1999).

[177] *See generally* Kelly v. Yale Univ., No. Civ.A. 3:01-CV-1591, 2003 WL 1563424 (D. Conn. Mar. 26, 2003) (ruling on defendant's motion for summary judgment).

[178] *Id.* at *1.

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] Kelly filed her complaint in October, and her attacker did not leave until the end of the fall semester. *Kelly*, 2003 WL 1563424, at *1.

[184] *Id.* at *3.

[185] *Id.* at *4.

possibility of further harassment by her attacker.[186] Because she later withdrew from her classes, as Yale took no immediate action, the district court agreed that Yale had a duty under Title IX to prevent future harassment.[187]

This case is helpful on the issue of what standards courts should apply in determining an institution's liability under Title IX when colleges and universities fail to respond properly to allegations of campus rape. The *Kelly* court examined what constitutes a hostile-environment claim on campus during the aftermath of an assault.[188] To establish a claim based on Title IX, the plaintiff has the burden of proving the severity of the harassment, that the university was given notice of the harassment, and that the university exhibited deliberate indifference to the harassment.[189]

D. *Federal Guidance*

Student activists are relying more frequently on Title IX claims to hold schools more accountable.[190] In response to this growing epidemic, the Obama Administration undertook a major effort to better enforce the laws addressing rape and sexual assault at educational institutions.[191] In 2011, Vice President Biden and Education Secretary Duncan announced new guidance to help schools, colleges, and universities understand their obligations under Title IX.[192] The guidance issued to schools came in the form of a "Dear Colleague" letter establishing standards for institutional action in reducing sexual violence on campus by educating students and employees on prevention and

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[186] *Id.* at *3.

[187] *Id.* at *3–4 ("[A] reasonable jury could conclude that further encounters, of any sort, between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities provided by a university. . . . After Yale received notice of the harassing conduct, it had a duty under Title IX to take some action to prevent the further harassment of Kelly. . . . In order for Yale's conduct to be actionable under Title IX, Yale's 'deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it.'" (quoting Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 644–45 (1999))).

[188] *Id.* at *3.

[189] *Kelly*, 2003 WL 1563424, at *3.

[190] WHITE HOUSE COUNCIL ON WOMEN & GIRLS, *supra* note 5, at 25.

[191] "The statistics on sexual violence are both deeply troubling and a call to action for the nation." OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE 2 (APR. 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html [https://perma.cc/P5JC-TQ3P] [hereinafter DEAR COLLEAGUE LETTER] (offering guidance on Title IX implementation). For additional examples of the Obama Administration's response to sexual assault on college campuses, see *supra* note 24.

[192] *Vice President Biden Announces New Administration Effort to Help Nation's Schools Address Sexual Violence*, U.S. DEP'T EDUC. (Apr. 4, 2011), https://www.ed.gov/news/press-releases/vice-president-biden-announces-new-administration-effort-help-nations-schools-ad [https://perma.cc/J2FZ-SMV5]; *see also* DEAR COLLEAGUE LETTER, *supra* note 191, at 1.

response.[193] The letter explains that any form of sexual violence, including "rape, sexual assault, sexual battery, and sexual coercion," is considered sexual harassment under Title IX.[194]

Despite concerted efforts to better educate institutions on critical institutional prevention and response, Baylor University made national headlines in 2016 for its failure to effectively implement both Title IX and VAWA requirements.[195] Following seventeen sexual assault allegations against nineteen Baylor football players, Baylor hired the law firm Pepper Hamilton to conduct an independent review of the university's response to Title IX and other compliance issues for three academic years beginning in fall 2012.[196] A summary of Pepper's findings described Baylor's failure to support students who came forward with sexual assault allegations and found that administrators actually discouraged these students from reporting the incidents.[197] These findings prompted Baylor to remove university president Kenneth Starr and football coach Art Briles.[198]

Baylor's startling example demonstrates that even in an educational environment, education alone will not suffice. For an institution to be truly effective in sexual violence prevention and response, additional measures must be adopted. Colleges often fail to take the appropriate steps to accurately represent the safety of their campuses, reasonably warn students of the propensity to be assaulted on campus, provide adequate security for dormitory residents, and even offer their students the same protection under Title IX when responding to sexual assault allegations.[199] When institutions fail to take

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[193] DEAR COLLEAGUE LETTER, *supra* note 191, at 2. The "Dear Colleague" letter urged federally funded educational institutions nationwide to take proactive steps to address sexual violence by providing information to assist them in meeting their obligations. *Id.* Recommendations included the implementation of preventive education programs. *Id.* at 14–15. In 2014, the OCR supplemented the letter by providing clarification and additional guidance. OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE ii (Apr. 2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [https://perma.cc/C4U5-5E2D].

[194] DEAR COLLEAGUE LETTER, *supra* note 191, at 1–2.

[195] BAYLOR UNIV. BD. OF REGENTS, FINDINGS OF FACT 4 (May 2016), http://www.baylor.edu/rtsv/doc.php/266596.pdf [https://perma.cc/7JXC-T654].

[196] Laura Wagner, *Baylor Regents Describe Gang Rape, Other Alleged Assault by Football Players*, NPR: TWO-WAY (Oct. 29, 2016), http://www.npr.org/sections/thetwo-way/2016/10/29/499882576/baylor-regents-describe-gang-rape-other-alleged-assault-by-football-players [https://perma.cc/RTD4-ZJTY]; *see also* Dana Farrington, *Baylor Removes Ken Starr as President over University's Response to Sex Assault Cases*, NPR: TWO-WAY (May 26, 2016), http://www.npr.org/sections/thetwo-way/2016/10/29/499882576/baylor-regents-describe-gang-rape-other-alleged-assault-by-football-players [https://perma.cc/CKB4-YBWB].

[197] BAYLOR UNIV. BD. OF REGENTS, *supra* note 195, at 1–2; *see also* Farrington, *supra* note 196.

[198] Farrington, *supra* note 196.

[199] *See* U.S. SENATE SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, *supra* note 6, at 1–2.

adequate steps towards preventing foreseeable criminal acts of third parties, courts are finding them liable.[200] For these reasons, institutions should implement significant preventative measures that combine programming on alcohol abuse and sexual assault, bystander training, a dedicated campus sexual assault task force, and widespread notification of their sexual assault policies.

However, even if institutions implement these measures, the enormity of the problem would make it too burdensome to shoulder alone. The lack of helpful federal oversight and fluctuating common law doctrine make it challenging for universities to construct effective policies and procedures. Therefore, courts, legislatures, colleges, and universities must all work together to provide the most effective solution to the campus sexual assault problem.

VI. A MULTIFACETED SOLUTION

Many colleges choose not to implement remedial measures to prevent foreseeable acts for fear of negative publicity and public scrutiny.[201] Yet, universities are well aware that sexual assault on college campuses is a nationwide epidemic garnering widespread attention from the nation's top leaders.[202] While there is no clear-cut solution to the problem,[203] university administrators, legislatures, and courts can all work together under a multifaceted approach and take substantial steps towards resolving this issue. By incorporating four key foreseeability factors into university policies and codifying these same factors into both federal and state law, the judicial analysis of the student–college relationship will be based on much clearer guiding factors, thereby providing better uniformity and predictability of the

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[200] *E.g.*, Miller v. State, 467 N.E.2d 493, 497 (N.Y. 1984).

[201] SLOAN & FISHER, *supra* note 3, at 29 (discussing the college campus image and that if there is information that is negative to a college's image, they don't want you to know about it); *see also* Griffaton, *supra* note 37, at 532 ("[A]dministrators and officials are concerned with the damage to their school's reputation (enrollment) and alumni support (donations) that might result from divulging their campus crime problems."); Chain Camera Pictures, *The Hunting Ground*, HUNTING GROUND FILM, http://thehuntinggroundfilm.com/ [https://perma.cc/F83K-6Z37] ("Universities are protecting a brand.").

[202] *See supra* note 24 (discussing government efforts to combat sexual violence on campus).

[203] This problem was first introduced over thirty years ago, and courts, academics, and college administrations have struggled with it ever since. *See* Nancy Hauserman & Paul Lansing, *Rape on Campus: Postsecondary Institutions as Third Party Defendants*, 8 J.C. & U.L. 182, 192 (1981–82) ("Civil actions based on sexual assault in which the third party defendant is a postsecondary institution (university or college) appear to be recent innovations."); *see also* Martha Chamallas, *Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases*, 14 LEWIS & CLARK L. REV. 1351, 1373 (2010) (describing the rise in the number of civil cases brought by sexual assault victims in the last thirty years).

surrounding issues for both victims and institutions. However, to properly inform the factor implementation discussion, this Note must first synthesize its previous analysis of common law theories of liability and determine why previously adopted judicial approaches will simply not work for a proper foreseeability determination.

A. *Common Law Foreseeability Determinations*

Though common law does not automatically impose an obligatory legal duty upon universities to shield students from third party harm,[204] the cases examined throughout this Note demonstrate exceptions to this general rule under the common law theories of negligent misrepresentation, landlord–tenant, and landowner–business invitee, as courts have recognized the imposition of a duty under the existence of a special student–college relationship and the reasonably foreseeable acts of third parties.[205] Therefore, foreseeability is the cornerstone on which institutional liability hinges, as it sways the court's duty determination. Equally apparent, and yet also troubling, is the lack of guidance for determining foreseeability, leaving an abundance of case law lacking in uniformity and direction.[206]

Some courts have made a foreseeability determination when the university had knowledge of prior similar acts.[207] This approach includes several flaws. It essentially precludes the first victims of these crimes from accessing relief, provides no incentive for landowners to take even minimal security precautions,[208] and narrowly focuses on the specific incident and not the overall risk of reasonably foreseeable harm to others.[209]

Other courts have noted foreseeability was not dependent on evidence of prior acts, but the precautions taken by the institutions to protect students

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[204] Nero v. Kan. State Univ., 861 P.2d 768, 778–79 (Kan. 1993) (finding ultimately, however, a university acting as a landlord owed its student-tenants a duty of reasonable care after a rape occurred in one of its dormitories).

[205] *See e.g.*, *id.* at 778–80 (rejecting a duty arising purely from "the university-student relationship," but discussing liability under landlord–tenant and landowner–invitee theories). For a detailed analysis of judicial determinations of duty, see *supra* Part III.

[206] Chamallas, *supra* note 203, at 1374 ("[T]he legal doctrine with respect to third-party criminal attack cases is currently in a state of confusion. . . . [T]he fight is now over duty with no clear direction in the case law."); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 40 reporters' n., cmt. *l* (AM. LAW INST. 2012) ("Courts are split on whether a college owes an affirmative duty to its students. Some of the cases recognizing such a duty are less than ringing endorsements, often relying on other aspects of the relationship between the college and its student to justify imposing a duty."); W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 671 (2008) ("Courts say and do things that seem wildly inconsistent . . . .").

[207] *See, e.g.*, Duarte v. State, 151 Cal. Rptr. 727, 735 (Ct. App. 1979); Miller v. State, 467 N.E.2d 493, 497 (N.Y. 1984); *see also* Griffaton, *supra* note 37, at 581.

[208] Delta Tau Delta v. Johnson, 712 N.E.2d 968, 972 (Ind. 1999), *abrogated by* Rogers v. Martin, 63 N.E.3d 316 (Ind. 2016).

[209] *Id.*

against these acts.[210] In these cases, courts reason precautionary steps taken by institutions to prevent criminal acts would seem irrational unless these acts were foreseeable.[211] By dispensing with the requirement of prior similar acts as a prerequisite, this "totality of the circumstances" approach is noted as a more liberal stance towards making a duty determination.[212] This type of duty determination also places universities in a precarious position, as they must safeguard students against any third party criminal attack no matter the severity;[213] but the irony is that by taking such precautionary measures, universities open themselves up to liability. Therefore, it, too, provides little incentive to act. As one scholar pointed out, these two approaches are too pliable and do not provide the factfinder with a "reliable guide" in making a duty determination.[214]

1. *The Restatement (Second) Approach*

Other commentators simply argue that the Restatement (Second) approach used by courts is outdated and should be eradicated.[215] The argument for disposal pointedly addresses the flawed prior similar acts and totality of circumstances tests by asserting that the Restatement (Second) neglects to confront the innate procedural defects, thereby inhibiting any meaningful solution.[216] Further, the Restatement (Second) does not identify the student–college relationship as special in its list of circumstances, but instead offers a potential catchall provision via a caveat.[217] These ambiguities hand the court the difficult task of properly characterizing the student–college relationship as one falling within one of the common law theories of liability discussed previously in Part III.B based on the existence of a special relationship as interpreted from the conditions that are outlined in the Restatement (Second).[218] Recognizing the significant challenge facing jurists, the existence of a special student–school relationship has since been added to the

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[210] *See* Stanton v. Univ. of Me. Sys., 773 A.2d 1045, 1049 (Me. 2001); Mullins v. Pine Manor Coll., 449 N.E.2d 331, 335–36 (Mass. 1983).

[211] *See Stanton*, 773 A.2d at 1050; *Mullins*, 449 N.E.2d at 335–36.

[212] Chamallas, *supra* note 203, at 1377.

[213] *See id.* at 1374 ("[T]he doctrine governing third-party criminal attack cases draws no formal distinction between rape and sexual assault cases on the one hand, and cases involving other types of criminal attacks . . . .").

[214] *Id.* at 1377.

[215] *E.g.*, Tyler Brewer, *The Restatement (Third) of Torts: Combating Sexual Assaults on College Campuses by Recognizing the College-Student Relationship*, 44 J.L. & EDUC. 345, 355 (2015).

[216] *Id.* at 390.

[217] RESTATEMENT (SECOND) OF TORTS § 314A & caveat (AM. LAW INST. 1965); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 40 cmt. *l* (AM. LAW INST. 2012).

[218] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 323, 344.

Restatement (Third), which extends to the student–college relationship.[219] This new characterization of the student–college relationship seems to provide for an affirmative duty regardless of the source of the risk.[220] However, this addition provides for a contextual duty analysis,[221] and this approach still doesn't appear to provide the clearest guidance for the fact finder in future cases.

2. *The Restatement (Third) Approach*

The Restatement (Third) approach further confuses the debate, because it does not contain a list of foreseeability factors to be used by courts in making duty determinations, and, according to some scholars, the Restatement (Third) proclaims that such factors play no role in these determinations.[222] However, some commentators have suggested courts should adopt the Restatement (Third) approach[223] by incorporating foreseeability into a balancing approach and considering all circumstances surrounding an event with a view towards the traditional foreseeability factors adopted by the *Mullins* court.[224] However, this approach does not go far enough. A foreseeability assessment should extend beyond the inherent risk factors articulated in *Mullins*.[225]

3. *Moving Beyond the* Mullins *Factors and Restatement (Third) Approach*

Instead, there are four additional factors that courts should consider when assessing foreseeability. These four factors include: (1) the presence of educational and training programs on campus; (2) annual climate surveys; (3) a dedicated campus sexual assault task force; and (4) widespread notification of campus sexual assault policies. Under the Restatement (Third) approach, "[f]oreseeability . . . relates to practical considerations concerning the actor's ability to anticipate future events or to understand dangerous conditions that

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[219] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 40(b)(5).

[220] *Id.* § 40 cmt. g ("[T]his Section applies regardless of the source of the risk. Thus, it applies to risks created by the individual at risk as well as those created by a third party's conduct, whether innocent, negligent, or intentional.").

[221] *Id.* § 40 cmt. *l* ("[B]ecause of the wide range of students to which it is applicable, what constitutes reasonable care is contextual—the extent and type of supervision required of young elementary-school pupils is substantially different from reasonable care for college students.").

[222] Cardi & Green, *supra* note 206, at 681–82.

[223] Brewer, *supra* note 215, at 367.

[224] *See id.* at 390 ("[T]he Restatement (Third) embraces the *Mullins* opinion through its expectation of a duty based on the inherent risks associated with attending college—including sexual attacks.").

[225] *See* Mullins v. Pine Manor Coll., 449 N.E.2d 331, 335–36 (Mass. 1983).

already exist."[226] By incorporating these four factors into campus initiatives, federal and state laws, and judicial analyses using the Restatement (Third) approach, not only will courts be better able to make a duty determination, but courts, institutional administrations, and legislatures will also be able to launch a cooperative approach towards resolving the campus sexual assault problem.

B. *Four Foreseeability Factors*

When making a duty determination, courts should consider all relevant factors in the case instead of adopting a myopic view of traditional risk factors, such as only considering past similar incidents.[227] While significant factors suggested by other commentators align themselves closely with the issues,[228] they fail to strike at the heart of the matter. Instead, further expanding upon the idea that courts should consider "customs or norms within the college community, both nationally and locally,"[229] courts should consider (1) the presence of educational and training programs on campus; (2) annual climate surveys; (3) a dedicated campus sexual assault task force; and (4) widespread notification of campus sexual assault policies. The first step towards a unified utilization of these factors is implementation of effective educational and training programs at the institutional level.

1. *Factor One: Effective Educational and Training Programs on Campus*

Universities should include all four of the additional foreseeability factors when implementing preventative programs, and this begins with implementing effective educational and training programs on campus. In order to implement effective education and training programs at the institutional level, universities should combine currently offered programs on alcohol abuse and sexual assault, and offer bystander training and intervention. Further, effective program implementation that is in compliance with existing federal guidance offers better protection for both students and institutions.[230] Therefore, this factor should weigh heavily in a court's assessment of precautionary measures taken by institutions when determining foreseeability.

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[226] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 cmt. g (AM. LAW INST. 2010).

[227] Brewer, *supra* note 215, at 361–62 (explaining this is preferable in lieu of a narrowly focused past similar incidents test).

[228] *Id.* at 361 (following the *Mullins* court suggestion by including factors other than prior similar incidents). Brewer suggests courts should make foreseeability determinations by examining factors such as prior crimes of a similar and nonsimilar nature occurring both on and off campus, "[t]he size and location of the college," the presence of security, and "customs or norms within the college community, both nationally and locally." *Id.*

[229] *Id.*

[230] *See* OFFICE OF CIVIL RIGHTS, *supra* note 193, at 38–42.

a. *Combined Alcohol Abuse and Sexual Assault Programming*

In order to afford better protection to both students and universities, programs on the prevention of alcohol abuse must work in cooperation with sexual assault prevention programs.[231] The presence of alcohol is a prime example of an existing custom and social norm within the college community warranting consideration by courts in the foreseeability analysis, and universities are all too aware of it.[232] Although numerous educational institutions have implemented alcohol prevention programs and policies, with a particular emphasis on underage drinking, on college campuses, some administrators have nonetheless expressed dissatisfaction with these efforts.[233]

To help alleviate this concern, the DOE published information on model programs across the country and these programs' effective implementation of policies and procedures to combat alcohol abuse.[234] The featured universities' strategies had a positive influence on campus culture regarding the use of drugs and alcohol.[235] Although the causal relationship between alcohol abuse and sexual assault has not been confirmed, studies show that intoxication increases a student's vulnerability to rape.[236] The effects of alcohol impair communication, enhance misperception about sexual intentions, and diminish the ability to resist.[237] By reducing the amount of drinking that occurs in the

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[231] Abbey, *supra* note 14, at 125 ("Most acquaintance rape prevention programs discuss alcohol as a risk factor, but many do not emphasize it." (citation omitted)).

[232] SLOAN & FISHER, *supra* note 3, at 139 (opining that binge drinking has long been the educational institution's "dirty little secret" (quoting JOSEPH R. BIDEN, JR., EXCESSIVE DRINKING ON AMERICA'S COLLEGE CAMPUSES: A REPORT FROM SENATOR JOSEPH R. BIDEN, JR. 6 (Oct. 2000), http://compelledtoact.com/Involvement_categ/Federal_law/Biden_Resol_Report.pdf [https://perma.cc/5MMS-DFK8])). Some say that "[t]he Ivory Tower image of America's college campuses is severely blurred by alcohol." *Id.* (quoting Claude Burgett, *Alcohol Abuse Plays Large Role in Crime*, USA TODAY, Dec. 5, 1990, at 8A).

[233] *Id.* at 142; Henry Wechsler et al., *Colleges Respond to Student Binge Drinking: Reducing Student Demand or Limiting Access*, 52 J. AM. C. HEALTH 159, 165 (2004) (conducting a study that showed a high percentage of schools implementing alcohol abuse prevention efforts on campus considered those efforts to be only "somewhat successful").

[234] OFFICE OF SAFE & DRUG-FREE SCH., U.S. DEP'T OF EDUC., ALCOHOL AND OTHER DRUG PREVENTION ON COLLEGE CAMPUSES: MODEL PROGRAMS 6 (Sept. 2008), http://www.alcoholeducationproject.org/DOEModelPrograms2008.pdf [https://perma.cc/H9UN-KL5U].

[235] *Id.* at 4–5. Examples included: "[f]orming partnerships with local communities to ensure that alcohol is not served to minors or to intoxicated students," "[e]liminating alcohol industry support for athletics programs," "[m]onitoring fraternities to ensure compliance with alcohol policies and laws," "[p]roviding a wide range of alcohol-free social and recreational activities," and "[l]aunching a media campaign to inform students about the actual amount of drinking that occurs on campus." *Id.*

[236] Abbey, *supra* note 14, at 125 (stating that consumption of "[a]lcohol increases the likelihood of sexual assault occurring among acquaintances during social interactions," but that "causality cannot be firmly established because [of the study's] methodological limitations"); Tuerkheimer, *supra* note 25, at 24.

[237] Abbey, *supra* note 14, at 120.

collegiate setting, universities would also reduce the number of sexual assaults that occur.[238]

Comprehensive combined alcohol and sexual assault education and training programs may assist in clarifying societal misconceptions about these issues and further decrease the number of sexual assaults on campus.[239] These comprehensive training programs should be provided to the entire university community, which includes students, faculty, and staff. Despite significant and ongoing governmental efforts to deter sexual assault on college campuses, there remains a significant number of untrained members of the university community.[240]

Further, education should not be solely targeted towards one group.[241] Education and prevention training efforts typically focus on likely victims, but education should also concentrate on likely perpetrators as well.[242] Fraternity parties have long been a fixture among collegiate customs and norms, and numerous courts assess rape allegations based on incidents that take place in the fraternity setting.[243] These prevention programs should be required for all

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[238] *See id.* at 125.

[239] *See id.* at 125–27 (noting that combined alcohol and sexual assault programs can help address misconceptions about the relationship between alcohol, consent, behavior, and sexual assault); *see also* WHITE HOUSE COUNCIL ON WOMEN & GIRLS, *supra* note 5, at 27–28 (discussing the social norms sometimes held by men, and how bystander intervention training can help reduce sexual assault). The Center for Disease Control and Prevention reviewed sexual assault prevention strategies and determined "effective programs are those that are sustained (not brief, one-shot educational programs), comprehensive, and address the root of the individual, relational, and societal causes of sexual assault." WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE 9 (Apr. 2014), https://www.whitehouse.gov/sites/default/files/docs/report_0.pdf [https://perma.cc/J9YN-NMMF] [hereinafter WHITE HOUSE TASK FORCE].

[240] U.S. SENATE SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, *supra* note 6, at 1. "More than 20% of institutions . . . provide no sexual assault response training . . . for members of their faculty and staff." *Id.* Further, "[m]ore than 30% of schools do not provide any sexual assault training for students." *Id.*; *see also* Jamie Altman, *Former UC-Berkeley Students Sue University for Mishandling Sexual Assaults*, USA TODAY C. (July 1, 2015), http://college.usatoday.com/2015/07/01/former-uc-berkeley-students-sue-university-for-mishandling-sexual-assaults/ [https://perma.cc/3MXC-MZTE] (describing an audit which found that several California public universities "do not ensure that all faculty and staff are sufficiently trained on responding to sexual assault cases").

[241] AM. ASS'N OF UNIV. PROFESSORS, CAMPUS SEXUAL ASSAULT: SUGGESTED POLICIES AND PROCEDURES 370 (Nov. 2012), https://www.aaup.org/file/Sexual_Assault_Policies.pdf [https://perma.cc/KNA6-JRWD] ("[P]rojects . . . aimed at the peers and peer groups of potential perpetrators and potential victims . . . may provide significant education to the campus community and have an impact on the larger campus culture.").

[242] *Id.* at 369–70.

[243] Julie Novkov, *Equality, Process, and Campus Sexual Assault*, 75 MD. L. REV. 590, 618 (2016) ("Among men on college campuses, fraternity men are more likely to commit rape than other college men." (quoting John D. Foubert et al., *Behavior Differences Seven Months Later: Effects of a Rape Prevention Program*, 44 NASPA J. 728, 730 (2007))); *see also* Delta Tau Delta v. Johnson, 712 N.E.2d 968, 973–74 (Ind. 1999), *abrogated by*

entering and transfer students and should include instructions from peer educators that focus on what it means to consent and potential bystander intervention techniques.[244]

b. *Bystander Training and Intervention*

Mandatory bystander intervention training is another effective, preventative measure universities should implement on campus as part of the educational and training programs offered, and it is also a factor courts could look to when assessing precautionary measures in the foreseeability analysis. Under the arguably outdated Restatement (Second of Torts) approach,[245] a bystander has no duty to protect another person from harm whether or not he or she realizes or should realize that person requires action on the part of another person to protect them from harm.[246] Yet, research suggests that bystander intervention may be an effective tool in preventing sexual assault, because those trained in bystander intervention view intervention as an assumed responsibility.[247] Bystander intervention attempts to engage men and

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Rogers v. Martin, 63 N.E.3d 316 (Ind. 2016); FISHER ET AL., *supra* note 4, at 18 (examining data which showed that 10.3% of "completed rapes" occurred in a fraternity); Abbey, *supra* note 14, at 124 (describing research which shows that fraternity "peer norms" include excessive drinking and expecting sex from female students).

[244] AM. ASS'N OF UNIV. PROFESSORS, *supra* note 241, at 369. The Department of Education now requires all institutions of higher education to include a definition of consent "to incoming students and new employees[,] and describe [it] in their annual security reports[,] primary prevention[,] and awareness programs." Violence Against Women Act, 79 Fed. Reg. 62752, 62752 (Oct. 20, 2014) (codified at 34 C.F.R. § 668 (2016)). An example consent policy could resemble Swarthmore College's, which states:

> *Consent* to engage in sexual activity must be knowing and voluntary; it must exist from the beginning to end of each instance of sexual activity and for each form of sexual contact. . . .
>
> . . . .
>
> Consent consists of an outward demonstration indicating that an individual has freely chosen to engage in sexual activity. Relying on non-verbal communication can lead to misunderstandings. Consent may not be inferred from silence, passivity, lack of resistance, or lack of an active response alone. A person who does not physically resist or verbally refuse sexual activity is not necessarily giving consent.

Sexual Assault & Harassment Policy: 2016–2017, SWARTHMORE C., http://www.swarthmore.edu/share/sexual-assault-harassment-policy#definitions [https://perma.cc/SQA5-WFP5].

[245] *See* Brewer, *supra* note 215, at 355.

[246] *See* RESTATEMENT (SECOND) OF TORTS § 314 (AM. LAW INST. 1965).

[247] Nancy Cohen, *Training Men and Women on Campus to 'Speak Up' to Prevent Rape*, NPR (Apr. 30, 2014), http://www.npr.org/2014/04/30/308058438/training-men-and-women-on-campus-to-speak-up-prevent-rape [https://perma.cc/K2AF-QZXJ] (explaining that students trained in bystander intervention begin to view intervention as a duty); *see also* Michael Winerip, *Stepping Up to Stop Sexual Assault,* N.Y. TIMES (Feb. 7, 2014), http://www.nytimes.com/2014/02/09/education/edlife/stepping-up-to-stop-sexual-assault.html?_r=0 [https://perma.cc/HM6D-WSA9].

women in actions that actively interrupt others' behaviors that tend to lead to sexual violence.[248] Furthermore, bystander awareness programming reconstructs many misconceptions about peer value and sexual assault.[249]

Early evaluations about the effectiveness of bystander training are promising.[250] Federal law now mandates bystander intervention training on college campuses.[251] In addition, some states have legislation mirroring the federal bystander training requirement.[252] By combining mandatory bystander, alcohol abuse, and sexual assault training requirements at the university, state, and federal levels, courts will be able to better make a foreseeability determination by assessing an institution's precautionary steps towards effective on-campus educational and training programs.

2. *Factor Two: Annual Climate Surveys*

The second factor that universities, legislatures, and courts should consider in the foreseeability analysis is annual climate surveys. Senator Kristen Gillibrand, sponsor of pending campus sexual assault legislation,[253] commented on the need for mandatory sexual assault surveys on campuses, which are frequently mentioned as a high priority by student survivors and advocates alike.[254] Experts have also emphasized "that annual climate surveys—confidential student surveys regarding behaviors that constitute or are associated with sexual assault—are one of the best ways" to attain a more reliable picture of the gravity of the campus sexual assault situation.[255] Through these "climate surveys," participants anonymously report any experiences with sexual violence and how their institutions have responded.[256]

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[248] Cohen, *supra* note 247.

[249] WHITE HOUSE TASK FORCE, *supra* note 239, at 9–10.

[250] Sarah L. Swan, *Bystander Interventions*, 2015 WIS. L. REV. 975, 991, 994; *see also* Jennifer Steinhauer, *White House to Press Colleges to Do More to Combat Rape*, N.Y. TIMES (Apr. 28, 2014), http://www.nytimes.com/2014/04/29/us/tougher-battle-on-sex-assault-on-campus-urged.html [https://perma.cc/U9AW-A7GS] (noting that the White House Task Force on Campus Sexual Assault recommends higher learning institutions to adopt bystander training in lieu of less effective sexual assault prevention efforts).

[251] 20 U.S.C. § 1092(f)(8)(A) (2012 & Supp. II 2014).

[252] Swan, *supra* note 250, at 994–95. For example, New York requires "that all incoming students must receive sexual violence prevention training that includes bystander intervention strategies." *Id.* at 995; *see also* 2014 Conn. Acts 47, 49 (Reg. Sess.) (requiring all state colleges to host bystander intervention training); Swan, *supra* note 250, at 995 ("[I]n California, schools must have implemented sexual violence awareness programs that include bystander training if they wish to be eligible for state funding for student financial assistance.").

[253] S. 590, 114th Cong. (2015).

[254] Steinhauer, *supra* note 250.

[255] U.S. SENATE SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, *supra* note 6, at 1.

[256] Steinhauer, *supra* note 250 (explaining that lawmakers would like to see a mandatory requirement for these surveys and tie federal funding to compliance).

However, according to Senator McCaskill's Sexual Violence on Campus Report, only 16% of the institutions in the Subcommittee's survey of 440 four-year universities conduct climate surveys.[257] By implementing these surveys as mandatory under university policies and federal and state law, it reinforces the Restatement (Third) approach of the relation of foreseeability to "the college's ability to anticipate future events or to understand dangerous conditions that already exist."[258] If annual surveys inform universities of sexual assault incidents taking place both on and off campus, this should strongly influence the court's foreseeability analysis of the existence of dangerous conditions, whereby an institution could have reasonably anticipated future sexual assault events in settings over which it exercised control.

3. *Factor Three: Dedicated Campus Sexual Assault Task Force*

A further detriment to effectively combating the sexual assault problem on campus is that, despite a federal reporting requirement, numerous reports of sexual violence go uninvestigated each year.[259] By implementing the third factor of a dedicated campus sexual assault task force, institutions would help resolve the discrepancy between the number of incidents reported and those actually investigated, and assist courts in their duty analysis by determining whether or not universities were aware of the existence of dangerous conditions in the community and steps they took to make them less foreseeable in the future.

This task force should consist of a majority of female officers,[260] should be available after regular business hours,[261] and should be a full-time professional staff whose sole responsibility is investigating reports of sexual violence. Further, not only would the dedicated task force address the current

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[257] U.S. SENATE SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, *supra* note 6, at 1.

[258] Brewer, *supra* note 215, at 362 & n.84 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 cmt. g (AM. LAW INST. 2010)).

[259] U.S. SENATE SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, *supra* note 6, at 1. During the five years preceding Senator McCaskill's report, more than 40% of 440 four-year institutions surveyed disregarded this requirement by failing to conduct an investigation for even one incident. *Id.*

[260] *See* Karen Oehme et al., *A Deficiency in Addressing Campus Sexual Assault: The Lack of Women Law Enforcement Officers*, 38 HARV. J.L. & GENDER 337, 350 (2015) ("The potential benefit from bolstering the presence of women in police forces takes on heightened focus on college campuses, where nationally women comprise a decided majority of the student population."); *see also id.* ("Research suggests that a low proportion of female police officers is one factor contributing to the reluctance of rape victims to come forward. . . . [G]reater numbers of women working in police agencies has been found to encourage more reporting by victims."). See *supra* notes 15–20 and accompanying text for an explanation of the unwillingness of victims to come forward about their victimization.

[261] U.S. SENATE SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, *supra* note 6, at 1 (stating that less than 50% of schools surveyed offered online sexual assault reporting).

lack of investigations and assist in the foreseeability analysis, but it would also assist universities in addressing claims of deliberate indifference in violation of Title IX.[262] However, in order to properly effectuate such changes, there should be widespread notification of campus sexual assault policies in place.

4. *Factor Four: Widespread Notification of Campus Sexual Assault Policies*

In order to most effectively implement the other foreseeability factors, institutions, state, and federal legislatures should also apply the fourth factor by mandating widespread notification of campus sexual assault policies via distribution of educational materials. Distribution of educational materials on campus preventative policies for combating sexual violence varies considerably from campus to campus.[263] The Dear Colleague Letter suggests that "schools develop specific sexual violence materials that include [each institution's] policies, rules, and resources," and that these materials should be distributed to all students, faculty, administrators, and members of student activity groups.[264]

Previously, courts have found that "the [u]niversity owed a duty to . . . warn and advise students [reasonably] of steps they could take to improve their personal safety."[265] Furthermore, courts have also determined that a university had a duty to warn students of the danger of potential sexual assaults on women.[266] Therefore, mass campus emails should be sent to all students, faculty, staff, and student activity group members with descriptions and links to each institution's policies on sexual violence.[267] Recall that courts have determined under the special relationship that exists between the school and the student, there is a legal duty to warn students of potential danger from third parties in the event such danger is foreseeable.[268] By adding this fourth

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[262] For a discussion of this standard and how courts are applying it, see *supra* Part V.C.

[263] *See* AM. ASS'N OF UNIV. PROFESSORS, *supra* note 241, at 368.

[264] DEAR COLLEAGUE LETTER, *supra* note 191, at 15.

[265] *E.g.*, Stanton v. Univ. of Me. Sys., 773 A.2d 1045, 1050 (Me. 2001).

[266] *See, e.g.*, Johnson v. State, 894 P.2d 1366, 1366, 1370 (Wash. Ct. App. 1995).

[267] Policy language should be written in a clear and easily understandable manner. According to the American Association of University Professors,

> [p]olicies and procedures must be clear, readable, and accurate; information must be widely disseminated and readily accessible to all members of the campus community; and materials must include descriptive (operational) definitions of sexual assault, rape, and other forms of sexual violence, explaining why these actions violate acceptable standards of conduct and, in some cases, constitute criminal offenses. Potential campus and criminal penalties should be made equally clear.

AM. ASS'N OF UNIV. PROFESSORS, *supra* note 241, at 369.

[268] *See, e.g.*, Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193, 1201–02 (Cal. 1984); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 40

factor, courts should apply considerable weight to whether or not a university had a duty of reasonable care to warn students of the dangers present on campus when assessing foreseeability. However, all four factors must not only be implemented at the university level, but they should also be codified into both federal and state law in order to provide clearer foreseeability factors to the courts.

C. *Federal and State Law Codification*

Federal statutes alone simply fail to properly address the problem.[269] The federal government has enacted numerous pieces of legislation intended to decrease sexual violence on campus.[270] However, while these laws represent positive steps toward addressing the problem, there are still gaping holes warranting attention.[271] The American Law Institute is also considering the issue and how to resolve it, though no final recommendation has been reached to date.[272] Furthermore, although there is pending legislation before Congress,[273] "education is traditionally a state function,"[274] and problems within the educational environment should also be handled at the state level. Additionally, states have plenary power and can deny immunity to their own

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cmt. *l* (AM. LAW INST. 2012) (stating that a special student–college relationship exists); Griffaton, *supra* note 37, at 542.

[269] For an evaluation of current measures in place, see *supra* Parts III, IV, V. *See also* Cantalupo, *supra* note 158, at 252 ("[I]t is no wonder that the Clery Act has not fulfilled its promise for improving public knowledge of what is happening at most schools . . . . Even if it had avoided allowing schools too much discretion to minimize reporting . . . , the ways that it counts crime demonstrate fundamental misunderstandings about how campus peer sexual violence operates."); Steinhauer, *supra* note 250 (discussing criticism of both ineffective past enforcement and of White House recommendations about combating sexual assault).

[270] Oehme et al., *supra* note 260, at 339.

[271] *Id.*

[272] *Project on Sexual and Gender-Based Misconduct on Campus: Procedural Frameworks and Analysis*, AM. L. INST., https://www.ali.org/projects/show/project-sexual-and-gender-based-misconduct-campus-procedural-frameworks-and-analysis/ [https://perma.cc/6EEB-JQMT].

[273] HALT Campus Sexual Violence Act, H.R. 2680, 114th Cong. (2015) (explaining that the legislation was introduced "to increase transparency and reporting on campus sexual violence, and for other purposes").

[274] Griffaton, *supra* note 37, at 554 & n.197 ("[E]ducation is perhaps the most important function of state and local governments." (alteration in original) (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954))); *see also* United States v. Lopez, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring) ("[E]ducation is a traditional concern of the States."); LAWRENCE E. GLADIEUX & THOMAS R. WOLANIN, CONGRESS AND THE COLLEGES 3 (1976) ("In the support and control of public higher education, the states have the primary responsibility. This is the most durable assumption concerning the relationship between the federal government and higher education.").

universities,[275] as public colleges and universities can be protected under sovereign governmental immunity.[276]

Though federal legislation was originally introduced to address the lack of uniformity among states,[277] comparable state laws could provide a cooperative front and remedy the current lack of federal oversight.[278] With current federal guidance serving as the foundation to accomplish the pending federal legislative goals of accountability and transparency,[279] these state laws should require: (1) the presence of educational and training programs on campuses in the form of combined alcohol and sexual assault programming and bystander training; (2) annual climate surveys; (3) a dedicated campus sexual assault task force; and (4) widespread notification of campus sexual assault policies.

D. *Future Duty Determinations*

While there may be disagreement among courts concerning how much weight to apply to the various foreseeability factors,[280] judicial interpretations are intended to broaden "foreseeability . . . to a consideration of all circumstances surrounding the event."[281] If an institution, with the backing of both the state and federal law, can proactively implement preventative measures with the four additional foreseeability factors in mind, a court should apply considerable weight to the precautionary measures taken and make a fair and equitable foreseeability determination.

Further, by using these factors, courts will not only be able to properly determine the degree of protection owed, but also whether a university exercised reasonable care or breached its duty.[282] In previous decades, courts have found instances in which universities effectively discharged any duty

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[275] The Tenth Amendment gives states plenary power over education. U.S. CONST. amend. X ("[P]owers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[276] BOHMER & PARROT, *supra* note 53, at 158–60 (explaining when a college can be sued and when immunity applies).

[277] *See* Griffaton, *supra* note 37, at 527 (discussing the variation of each state's reporting requirements and the subsequent passage of the Clery Act). However, "[w]hile a small number of institutions have put in place rigorous procedures for obtaining, collating, tracking, processing, and reporting Clery statistics, a standardized model for the overall process does not yet exist." AM. ASS'N OF UNIV. PROFESSORS, *supra* note 241, at 368.

[278] *See, e.g.*, Steinhauer, *supra* note 250 ("Lawmakers and the White House have previously condemned the assaults on campuses, but the federal government has largely left responses up to college officials and the local authorities."); Winerip, *supra* note 247 ("In a few instances the Dear Colleague letter provided specific guidelines; mostly it left universities to figure out how to carry out the mandate.").

[279] *See* HALT Campus Sexual Violence Act, H.R. 2680, 114th Cong. (2015).

[280] Brewer, *supra* note 215, at 358.

[281] *Id.* (quoting 4 J.D. LEE & BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 39:13 (2d ed. 2013)).

[282] *See id.* at 362.

owed to their students under a no-duty determination.[283] However, with the vast amount of national and governmental attention given to the problem of sexual assault,[284] courts are hesitant to apply a no-duty determination.[285] Therefore, if a college inadequately implements the foreseeability factors under its safety procedures and sexual assault policies, courts may still find the college owes a duty to its students.[286]

VII. CONCLUSION

Sexual assault has become an ever-increasing problem on college campuses, and universities are well aware of the extent. Many students attend school naïve and uninformed about the dangers they are exposed to, and courts continue to struggle with foreseeability determinations and to adequately define the parameters of the student–college relationship. Despite the lack of a precise definition and foreseeability roadmap, under basic common law principles, when universities fail to meet their duties as landlords or landowners, courts are finding them liable for negligence under the existence of a special relationship.

While universities cannot be insurers of safety,[287] university administrators, courts, and legislatures can all work together by taking a multifaceted approach towards resolving the sexual assault epidemic. This effort requires not only a legal shift, but a cultural one as well. By acknowledging the presence of sexual assault on campus as a foreseeable harm to students, and then taking steps to implement the four additional foreseeability factors to prevent that harm, courts will have clearer determinative factors, and college administrators will better safeguard their students against the threat of sexual violence and reduce the likelihood of institutional liability.

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[283] *E.g.*, Tanja H. v. Regents of the Univ. of Cal., 278 Cal. Rptr. 918, 925–26 (Ct. App. 1991) (Kline, J., concurring) ("[P]laintiff's reliance on the ability of the University to protect her against sexual assault was [not] both reasonable and foreseeable[,] and . . . the University [could not] have foreseen an unreasonable likelihood of harm as a result of such reliance[] if the University's promise to supervise student conduct in the dormitory was not carried out.").

[284] *See supra* note 24.

[285] Brewer, *supra* note 215, at 353 ("This fact alone will most likely eviscerate any attempt to invoke a no-duty rule to the college-student relationship.").

[286] *See* Griffaton, *supra* note 37, at 582.

[287] *See* Bradshaw v. Rawlings, 612 F.2d 135, 138 (3d Cir. 1979).